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Supreme Court of the United States

October Term, 1981

No. 80-1436

MALCOLM BALDRIGE, Secretary of Commerce, and
DANIEL B. LEVINE, Acting Director,
Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1781

WILLIAM H. McNICHOLS, JR., *et al.*,

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v.

MALCOLM BALDRIGE, *Secretary of Commerce, et al.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE, THE STATE OF NEW YORK, THE CITY OF NEW YORK, GOVERNOR HUGH L. CAREY, MAYOR EDWARD I. KOCH, *et al.*

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September 11, 1981

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PRELIMINARY STATEMENT

Amici are plaintiffs in an action pending against the Census Bureau which seeks redress of the serious constitutional injury

plaintiffs will suffer if the huge undercount of the New York population that occurred in the 1980 Census is not corrected.[1] *Carey v. Klutznick*, 508 F. Supp. 404; 508 F. Supp. 416 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 834 (2d Cir. 1980); 508 F. Supp. 420, *rev'd and remanded*, No. 81-6042 (2d Cir. June 12, 1981), *petitions for rehearing filed* July 24, 1981. Utilizing the most extensive factual record of any of the cases arising out of the 1980 Census, we present this brief in opposition to the position taken by the Census Bureau in *Baldrige v. Shapiro*, No. 80-1436, and *McNichols v. Baldrige*, No. 80-1781, that certain census documents are absolutely immune from disclosure.[2]

INTEREST OF AMICI CURIAE

Before this Court are two cases which present, in two somewhat different procedural contexts, the Government's claim that certain Census Bureau documents—specifically, lists of purportedly vacant housing units and address registers—are absolutely privileged from disclosure under the Census Act. The Government makes this claim despite the absence of any support in the language of the Census Act, despite the importance of the documents to the vindication of fundamental constitutional rights, and despite the availability of protective measures derived from the Census Act itself as well as the

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[1] Amici are the State and City of New York, their Governor and Mayor and eight voters from Congressional districts where census undercounting will result in particularly severe malapportionment.

[2] Because the Amici include eight non-governmental parties, they have obtained the consent of both petitioners and respondent in *Baldrige v. Shapiro* to the filing of this brief. Those consents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36. By the Court's order of August 28, 1981, *McNichols v. Baldrige* was consolidated with *Baldrige v. Shapiro* for purposes of oral argument. Although the Amici's case is closer on its facts to *McNichols*, Amici did not file a brief in support of the petitioners in that case because, as indicated below, until the Government's decision to seek rehearing in the Second Circuit in *Carey v. Klutznick*, Amici expected to file their own petition for certiorari. Since *Shapiro* and *McNichols* have been consolidated, we understand that this brief will be read in both cases and have captioned it accordingly.

Federal Rules of Civil Procedure which fully safeguard any legitimate concern for census confidentiality.

Amici commenced their action to compel the Census Bureau to correct an undercount in the State of New York. After trial on the merits, the district court found that there had been a disproportionately large undercount of the New York population, citing "conservative estimates" of that undercount which ranged from 750,000 to 900,000 people. *Carey v. Klutznick, supra,* 508 F. Supp. at 426-28, 433. An undercount of that magnitude would deprive New York State of at least one seat in the House of Representatives to which it is entitled. Moreover, since the undercount is disproportionately large among Blacks, Hispanics, aliens and the urban poor—groups that constitute a disproportionately large portion of New York's population—this undercount will result in a particularly injurious undercount of New York and, particularly, New York City. *Id.* at 426-27.

The Second Circuit affirmed the district court's preliminary injunction against the Census Bureau, *Carey v. Klutznick,* 637 F.2d 834 (2d Cir.), *aff'g,* 508 F. Supp. 416 (S.D.N.Y. 1980).[3]

[3] To remedy the undercount in New York, Amici sought both preliminary injunctive relief designed to insure that the census figures derived from the Bureau's then ongoing enumeration activities were as accurate as possible, and final injunctive relief requiring the Bureau to adjust the population totals statistically to correct for the racially and socioeconomically based undercount that cannot be eliminated through the Bureau's enumeration activities.

In October 1980, the district court granted Amici's motion for preliminary relief, ordering the Bureau to (1) process its own forms submitted by uncounted people after the Bureau's arbitrary deadline; (2) compare with census records a computerized file of New York City public assistance recipients prepared by the City; and (3) report the number of previously uncounted persons discovered by these means, and include them in the census. *See Carey v. Klutznick,* 508 F. Supp. 416 (S.D.N.Y. 1980).

The Bureau simply ignored the order for six weeks until, under threat of contempt, it appealed. On December 15, the Second Circuit affirmed the preliminary injunction in all respects. *Carey v. Klutznick,* 637 F.2d 834 (2d Cir. 1980). Only after its motions for a stay and rehearing were denied on December 29 did the Bureau even partially comply, while continuing to argue that checking the public assistance file would reveal no significant undercount because "redundant"

However, on the Government's subsequent appeal from the district court's final judgment after trial in favor of Amici, a different panel reversed and remanded for a new trial.[4] Both the Government and Amici have sought rehearing or rehearing en banc of that decision.

The basis for the Second Circuit's reversal was a discovery order requiring production of the same types of census documents as are involved here. Prior to trial, Amici requested, pursuant to Fed. R. Civ. P. 34, production of census documents which either show, or make it possible to show, which New York housing units had been counted, which missed, and which inaccurately classified as "vacant". This information is contained on the address registers, on forms indicating which units have been classified as vacant ("D-160") and on lists compiling D-160 forms. Except for individual census questionnaires, which Amici did not request, no other documents contain this information.

Prior to entry of its discovery order, the district court heard substantial evidence, described below, of the importance and relevance of the documents to Amici's claims. However, despite the conceded relevance of these documents, the Bureau refused to produce them, claiming they were absolutely privileged under 13 U.S.C. § 9(a). The district court disagreed and ordered their production subject to broad protective provisions designed to safeguard all legitimate concern for census con-

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census procedures had cured all the problems which Amici's proof had established. Yet, when the Bureau did partially comply, that compliance produced dramatic confirmation of a substantial New York undercount. Although the Bureau used checking procedures which understated the magnitude of the undercount, the Bureau found, nonetheless, that 8.5% of the people on the New York City public assistance list had not been counted. Report of the U.S. Bureau of the Census in Response to the Judgment of the Court entered December 29, 1980, at 3, 6, filed January 21, 1981, in *Carey v. Klutznick*, 80 Civ. 4550 (S.D.N.Y. December 22, 1980).

[4] *Carey v. Klutznick*, No. 81-6042 (2d Cir. June 12, 1981), *rev'g* 508 F. Supp. 420 (S.D.N.Y. 1980). This second and as yet unreported decision of the court of appeals is attached as an appendix to this brief.

fidentiality. The order allowed redaction of names of census respondents to protect their privacy, prohibited use of the materials for any purpose other than to help ensure an accurate census count, and required that anyone given access to the materials be sworn to confidentiality as specifically contemplated in 13 U.S.C. § 23(c).

Despite these protections, the Bureau refused to comply and unsuccessfully attempted an interlocutory appeal from the discovery order.[5] Thereafter, the district court was left with no choice but to find that "defendants have knowingly and wilfully placed themselves in contempt". Taking guidance from an earlier Second Circuit opinion regarding the proper sanctions for contempt by public officials,[6] it entered a carefully framed preclusion order under Fed. R. Civ. P. 37.

On appeal from the final judgment, the Bureau challenged both the discovery and preclusion orders (greatly exaggerating the effect the preclusion order had at trial). The preclusion order did not, in fact, affect the proof, or the Bureau's ability to rebut the proof, supporting the district court's essential findings that New York had been disproportionately undercounted and that statistical adjustment techniques to correct that undercount were feasible. As to these statistical and demographic issues, the Bureau was not precluded.

A divided panel of the Second Circuit reversed and remanded for a new trial. The majority opinion supported that disposition on two alternative theories. First, in a holding which is directly at issue in the cases presently before this Court, the Second Circuit held that the district court's discovery order was improvidently granted in light of the confidentiality provi-

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[5] The district court had stayed its order and granted the Bureau's request for a 28 U.S.C § 1292(b) certificate. That certification, as well as the Bureau's request for review by mandamus and under *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), was rejected by the Second Circuit. Although the Bureau's Director then claimed he would not comply unless ordered by this Court to do so, the Bureau sought neither a stay nor other review from this Court.

[6] *In re Attorney General*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979).

sion of 13 U.S.C. §9. The majority reached that conclusion without analysis of the statute, of the extensive factual record below establishing the importance of the census documents to the issues, or of the countervailing constitutional rights at stake. Rather, the majority, noting a conflict between the Third and Tenth Circuits, merely stated that it agreed with the holding in *McNichols v. Klutznick*, 644 F.2d 844 (10th Cir. 1981), *cert. granted sub nom. McNichols v. Baldrige*, 49 U.S.L.W. 3931 (June 15, 1981), that the documents are absolutely immune from discovery. *Carey v. Klutznick*, No. 81-6042 (2d Cir. June 12, 1981), slip. op. at 3727.

Alternatively, the Second Circuit held that even if the discovery order was proper, the preclusion order had prevented a full and fair disclosure of the facts, and thus was a reversible abuse of discretion. The irony of this holding—that the preclusion order, rather than the Government's contempt of a proper discovery order, prevented a fair trial—apparently eluded the court. Having disposed of the case on procedural grounds, the court never reached the merits of the trial court's ultimate finding that there had been a disproportionate undercount in New York and ignored Amici's demonstration that the preclusion order as applied at trial did not affect that finding.

Amici had hoped by now to have filed a petition for certiorari to review the Second Circuit's June 12 decision which would seek consideration with *McNichols* and *Shapiro* of the discovery issue, with the consequent benefit, *inter alia*, of placing before the court the most extensive record available on both the importance of the documents and the erosion of Constitutional rights threatened by the Bureau's adamant opposition to any judicial remedy for the undercount problem. However, the Government obtained an extension in the Second Circuit to decide whether to seek rehearing and then did so.[7] Since the Second Circuit has yet to act on the pending rehearing

[7] Since the Government had announced its intent to seek rehearing, Amici did so also, although stating our continued belief that the interests of justice would be better served if the broad census issues came to this Court more promptly.

petitions, Amici's position regarding the Government's claim of absolute privilege is presented in this brief.[7A]

We urge here that the absolute privilege claimed by the Census Bureau against discovery in all circumstances of the documents in issue is unwarranted by the Census Act, particularly in light of their importance to the vindication of paramount constitutional rights. We do not address the more limited issues raised under the Freedom of Information Act.

SUMMARY OF ARGUMENT

The 1980 Census cases present issues of fundamental constitutional importance. At stake is the constitutional guarantee of "equal representation for equal numbers of people". That guarantee is threatened because the Census Bureau, in its conduct of the 1980 Census, which will serve as the basis for legislative reapportionment throughout the coming decade, failed to count substantial numbers of people in various areas of the country.

Seeking to establish the existence and magnitude of this census "undercount" and obtain relief from the unconstitutional dilution of voting rights that it threatens, litigants in the various census actions have requested disclosure of census documents which show which housing units were counted, which missed, and which erroneously classified by the Census Bureau as vacant when they were in fact occupied. These documents are concededly vital to an accurate census count and to obtaining full relief.

Despite the conceded relevance and importance of these documents to the vindication of constitutional rights, the Bureau attempts to invoke the Census Act as an absolute bar to disclosure. However, the Bureau's statutory claim is without merit. The Census Act does not create a privilege from disclosure for the documents at issue here. And even if the Act is stretched to cover the documents, any privilege it creates is a

[7A] On September 10, 1981, after this brief had been set in page proofs, the Second Circuit denied the petitions for rehearing.

qualified one which is overcome by the great need for the evidence in the census suits, by the importance of the rights at stake, and by the ability of the court fully to protect legitimate confidentiality interests by fashioning appropriate protective orders.

ARGUMENT

I. THE BUREAU'S CLAIM OF ABSOLUTE PRIVILEGE IS INCONSISTENT WITH THE PROTECTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The question whether the census documents at issue here are absolutely immune from disclosure to litigants injured by serious errors and omissions in the census can be properly considered only in the context of the fundamental constitutional rights at stake, the causes of census undercounting and the admittedly close relationship between the withheld documents and the nature and extent of the undercount.

A. The Importance of the Documents.

1. *The Roots of the Undercount Problem.* The discovery issue presented by the 1980 Census litigation has its roots in the history of the Bureau's failure to count minorities and the discovery in 1970 of great problems with respect to the Bureau's classification of occupied housing units as vacant.

First, as the Bureau admits, there has been a long history of undercounting this nation's minorities and thus undermining their right to vote.[8] Thus, for example, in the 1970 Census there

[8] In virtually every census in our history an undercount has occurred, and minorities have invariably been missed at rates far exceeding those for Whites—often by as much as ten times. H. Alterman, *Counting People* 262-63 (1969). In early census-taking, Blacks were treated in an overtly discriminatory fashion, and, in the opinion of a census historian, "The earliest censuses established precedents whose effects [on Blacks] may not yet have entirely disappeared." *Id.* at 267. Since 1950, when modern techniques were first applied to measure the undercount, its size and disproportionate impact have been more precisely known. Thus, the undercount, according to the Bureau's "preferred" estimates, was about 5.1 million in 1950, 5 million in 1960, and 5.3 million in 1970. Even more

was at least a 7.7% undercount of this nation's Blacks but only a 1.4% undercount of Whites. Moreover, despite efforts to decrease the racial undercount disparity, the Bureau now believes that in the 1980 census the disparity between the rates of Black and White undercounting has increased.[9]

Second, the 1970 undercount would have been substantially greater but for the Bureau's treatment of one of the classes of addresses at issue in these cases—purportedly vacant housing units. After the 1970 count was completed, the Bureau discovered that census enumerators had frequently classified occupied units as vacant. To correct that error, the Bureau used statistical sampling techniques to "impute" over 1 million people to the census rolls. Altogether through such statistical techniques (including some used only in selected Southern

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important than the size of the undercount is the continuing fact that it is not uniform among racial or socioeconomic groups. Thus, for example, as the Bureau concedes, the undercount was at least four times greater for Blacks (and Hispanics) than for Whites in 1950, 1960 and 1970.

[9] In fact, the Bureau's preliminary studies suggest that in 1980 there was actually an overcount of the white population while Black females were missed at a rate of 2.1% and Black males at a rate of 7.5%. Siegel, J.S., Passel, J.S., and Robinson, J.G., *Coverage of the National Population by Age, Sex and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis,* unpublished Census Bureau memorandum, May 1981.

Throughout this litigation, the Bureau has frequently asserted that no judicial relief is warranted because in 1980 the undercount has been eliminated. This disingenuous claim is based on the Bureau's preferred estimate of between zero and 0.4% for the "measured" "net" national undercount in 1980. However, this national estimate is a net rate: gross undercounting less gross overcounting. As the district court in *Carey v. Klutznick* correctly found, moreover, it does not mean that some subnational areas—like the State of New York—were not substantially undercounted. 508 F. Supp. at 427. In fact, it is strong evidence that New York was substantially, disproportionately, undercounted. Given the undercount rates in New York—suggested by Amici's proof at trial and the Bureau's own study to be on the order of 6-10%—for the net national rate to be near zero, many other areas must have had either a negligible net undercount or a net overcount. The unconstitutional dilution of Amici's voting rights is thus clear.

states) the Bureau added some 4 million persons to the census totals in 1970.[10]

2. *The False Vacancy Problem.* In the New York case, Bureau employees testified that in the 1980 New York enumeration, numerous housing units, particularly in minority areas, had been listed as vacant when they were in fact occupied. The Bureau's supervisor for the Harlem area admitted that false vacancies had been tolerated by supervisory personnel "right on up the line". Similarly, the Bureau's senior officials conceded that the Bureau's piece rate pay system frequently caused enumerators to "curbstone"—the Bureau's own term for intentional falsification by enumerators which results in an undercount of the population.[11]

3. *The Mailing Address Problem.* The false vacancy problem does not arise until the second major stage of the census process when, after the initial mailout and mailback of census questionnaires, the Bureau's temporary employees attempt to enumerate the occupants of (or record as vacant) all units on the Bureau's basic address register which have not returned a census questionnaire by mail. This follow-up phase involving field work was overburdened in New York because the mail return rate of census questionnaires in New York was far below the national average of 85%. Indeed, the Bureau admitted that in minority areas in New York City the mail return rates ranged substantially below 50%. Thus, in New York as a whole, and particularly in such minority areas, there

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[10] In Amici's action, the Bureau took the position that it was barred by the Constitution and the Census Act from making the sort of statistical adjustments that it had used in 1970 to improve the accuracy of its count. The lower courts rejected this position. *Carey v. Klutznick*, 508 F. Supp. 404, 414-15 (S.D.N.Y. 1980); *see Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980).

[11] The pay system rewards enumerators almost as much for falsely recording a unit as vacant (which takes a few seconds) as for taking the time, trouble and risk of visiting an often dangerous area and attempting to count and obtain the demographic characteristics of all the people in an apartment unit. Moreover, the pay for falsely recording a unit as having only a single occupant is equal to that for correctly enumerating a family of many persons.

was a substantially greater opportunity for housing units to be falsely classified as vacant.

But that was not the only difficulty tied to the documents at issue. It also developed that there were substantial deficiencies in the Bureau's basic address register itself. *See Carey v. Klutznick*, 637 F.2d 834, 836 (2d Cir. 1980).

The Bureau's address register was compiled from address lists purchased from commercial sources. Based on admissions of Bureau employees, census documents and reports of the General Accounting Office, Amici, both prior to the discovery order and in greater detail thereafter, showed that the address registers used for mailing and subsequent enumeration for New York were woefully incomplete. For example, the president of the mail list company that supplied the purchased lists for New York testified that his firm had probably not mailed anything to the South Bronx for 10 years. Postal workers estimated, moreover, that the lists that were purchased for New York were from 4 to 10 years old on average. The Bureau itself estimated that the coverage of its initial mailing list for New York City was less than 60%.

Naturally, there were efforts by the Bureau to attempt to improve the quality of the initial lists. However, the Bureau's own precensus analysis of these measures conceded that the "better the initial list, the better the later correction operations will work". Moreover, as demonstrated by affidavits from Bureau employees submitted on behalf of Amici prior to the discovery order, there was substantial evidence that these operations had been incomplete and in some cases simply abandoned.[12]

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[12] That proof was further developed at trial, *see* 508 F. Supp. at 424, along with substantial other proof of conduct that led to undercounting.

That other proof, summarized by the district court at 508 F. Supp. at 423-26, overwhelmingly supports the court's findings that "the Bureau's conduct [of the census in New York] was on the whole unreasonable and at times irrational", *id.* at 430-31, and that this "mismanagement" of census operations contributed to the undercount, *id.* at 433.

In sum, the record in *Carey v. Klutznick* clearly established that deficiencies and errors in the address lists and erroneous designations on the vacant housing lists were major causes of census undercounting. The relevance and importance of the withheld documents to establishing the exact magnitude of the undercount is equally clear. What is more, the Bureau admits as much.

4. *The Admissions by Top Bureau Officials that the Withheld Documents Were Vital To Determining the Accuracy of the Census Count.* Prior to entry of the order requiring the Census Bureau to turn over its address and vacant housing lists to plaintiffs in *Carey v. Klutznick*, the district court ordered the deposition of George E. Hall, the associate director of the Bureau responsible for the decennial census. Mr. Hall testified that the address register "is the basic document controlling" the entire census process, both in the district offices and in the field.

This confirmed the prior testimony of the Bureau's New York Regional Director, William F. Hill. Indeed, Mr. Hill emphatically testified that the very "documents which should be reviewed" to determine whether census "problems . . . have been solved" are the address registers. According to Hill, the address registers are the only documents that contain that information:

"Q Are you telling me that there are no more substantive documents between—those [address registers] are highly detailed documents that you're talking about? Right?

"A Yes. Sure.

"Q There have been problems called to your attention in the past which you want to make sure are settled before you finish your job here, right?

"A Yes.

"Q I take it you're not telling me the way to go and identify those problems is to go look at the address register.

"A No, that's what I am telling you.

"Q You're telling me—

"A I'm telling you—

"Q Let me ask the question differently. Are you telling me there are no substantive documents which comment upon problems in the New York region?

"A In a context of what you asked me about things that have been identified previously or whatever and what we're doing about it, the answer is basically no, there aren't."

The utility of the address registers—and most particularly lists of vacant housing units—in locating and correcting census omissions was further confirmed by the Bureau's own conduct in New York. In July 1980, preliminary population and housing figures were provided to officials of the City of Peekskill, New York. Because the Bureau's figures showed fewer housing units than the city had projected, the city challenged the census totals. In response to the challenge, and contrary to the Bureau's current claim of an absolute statutory prohibition against disclosure, a census official took the address registers for several enumeration districts to the offices of Peekskill's City Planning Commission, where local officials used the registers to compile a list of housing units which had been classified in the address registers as vacant or non-existent. According to an unchallenged affidavit of the responsible Peekskill official,[13] a field check of the listed addresses subsequently revealed that over 70% (34 of 47) of the units in a single enumeration district that the Bureau had classified as vacant were in fact occupied.

This incident serves to emphasize (i) the Bureau's own belief, as confirmed by its Regional Director, that vacancy lists and address registers are the primary means of detecting false vacancies and other census errors; (ii) that localities, through the use of information contained in the withheld documents, are

[13] It also appears that address registers were disclosed to city officials of Detroit. *See* Affidavit of Patricia Cousens Becker, head of Data Coordination Planning Department of the City of Detroit, annexed as Appendix B to this brief.

capable of discovering errors in the counting process which would go undetected, or undisclosed after detection, by the Bureau; and (iii) that the Bureau itself has selectively revealed the documents to local officials, despite the claim it now makes that such disclosure is absolutely prohibited by the Census Act.

B. The Constitutional Rights and Duties at Stake.

While the precise question presented by these cases is a narrow one—whether census address and vacancy lists are immune from disclosure to litigants challenging the accuracy of the census—the ramifications of these and similar actions are of profound constitutional importance. The decennial census is central to the allocation of political rights under the Constitution. On the census rest (1) the Great Compromise between the original states, large and small; (2) the direct election of the House of Representatives "by the people of the several States" (U.S. CONST. art. I, § 2) with representatives apportioned among the states "according to their respective numbers" based on a census which is to count "the whole number of persons in each state" (U.S. CONST. amend. XIV, § 2); (3) the allocation of votes in the Electoral College (U.S. CONST. art. II, § 1); and ultimately (4) the constitutional guarantee of equal votes for equal numbers of people (see *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny). Given the vital role the decennial census plays in our system of government, Federal statutes providing for the taking of the census must be construed in a manner consistent with its constitutional purpose.

The Constitution requires that the census reflect, "as nearly as is practicable", the whole number of persons in each state. That is the sole constitutional function of the census and that high duty of accuracy flows from the constitutional purpose that the census serves, from the language of the Constitution, and from the decisions of this Court.

Article I, section 2, clause 3, of the Constitution, as amended by section 2 of the Fourteenth Amendment, provides in relevant part:

> "Representatives shall be apportioned among the several States according to their respective numbers, coun-

ting *the whole number of persons in each State,* excluding Indians not taxed." (Emphasis supplied.)

This formula was an integral part of the "Great Compromise" of the Constitutional Convention of 1787, under which independent states, large and small, agreed to surrender their sovereignty and form one nation. To effectuate the apportionment of Representatives among the States "according to their respective numbers", the Framers agreed that a census would be taken at regular intervals, pursuant to which reapportionment would occur. 1 *Records of the Federal Convention of 1787* at 579-80, 589-97 (Farrand ed. 1937). Thus, "[t]he direct and declared object of this census is, to furnish a standard by which 'representatives . . . may be apportioned among the several states' ". *Loughborough v. Blake,* 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.). The Fourteenth Amendment eliminated the requirement in Article I, section 2, that slaves should be counted as only three-fifths of a person. That change reinforced the substantive principle that the entire number of persons in each State is to be the basis of representation in the House. *See Cong. Globe,* 39th Cong., 1st Sess. 358-59 (remarks of Rep. Conkling), 141-42 (remarks of Rep. Blaine) (1866).

This Court's apportionment decisions further underscore the Census Bureau's constitutional duty of accuracy in its conduct of the decennial census. For example, in *Wesberry v. Sanders,* 376 U.S. 1 (1964), after recounting the history of the "Great Compromise", this Court affirmed that Article I, section 2 means that "*as nearly as is practicable* one man's vote in a congressional election is to be worth as much as another's". 376 U.S. at 7-8 (footnotes omitted) (emphasis supplied). The Court concluded that it is "our Constitution's plain objective [to make] equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." 376 U.S. at 18.

Kirkpatrick v. Preisler, 394 U.S. 526 (1969), shows how "high" this standard is. There this Court held unconstitutional

an apportionment plan that allowed 2-3% population variances among congressional districts. The Court observed:

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. . . . Therefore, the command of Art. I § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 531.

Of course, for the guarantee of "equal representation for equal numbers of people" to be realized, in the first instance the census totals upon which apportionment is based must be "as nearly as is practicable" accurate. If they are not, fundamental voting rights are denied just as surely and unconstitutionally as by avoidable population variances between voting districts. *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (the Constitution requires that "Congress be fairly apportioned, based on accurate census figures").

Like the plaintiffs in the various other census cases, Amici commenced their action when it became clear that the 1980 Census would fail by a substantial margin to count the whole number of people in New York. As noted above, Amici proved at trial that the 1980 undercount in New York was, by conservative estimate, as large as 900,000 people. *Carey v. Klutznick*, 508 F. Supp. 420, 428 (S.D.N.Y. 1980).

Despite an undercount of this magnitude, the Census Bureau consistently in *Carey* and in similar actions has argued, under various legal rubrics, that the Bureau's work is immune from judicial scrutiny. In considering the question of the discoverability of the vacancy and address lists, the Bureau's marked aversion to *any* scrutiny of its work should be kept in mind. Thus, not only does the Bureau claim that census documents that it says provide the best evidence of census errors and omissions are absolutely immune from disclosure,

but also it has repeatedly asserted the legal claims (1) that states, cities and voters lack standing to challenge census undercounting; (2) that census cases are not justiciable; (3) that the Constitution imposes on the Bureau no standard of accuracy whatsoever; and (4) that the decision as to whether or not even to try to do anything to correct the undercount is committed to the unreviewable discretion of the Bureau.[14] Moreover, it has refused to accept information from states and cities which would assist it in finding and correcting omissions, even when ordered to do so by the courts.[15] And, finally, it refuses to use known and reliable statistical methods to adjust erroneous census data to correct for undercounting.

The Bureau's defenses and conduct in these actions are all of a piece. The Bureau's position, in essence, is that however shoddy or irrational its work, however erroneous its count, and however grave the resultant injury to constitutional rights, the Federal courts are powerless to review its work and injured states, cities and voters have no remedy. Subversive as it is of constitutional government, the Bureau's position is plainly wrong.

II. THE CENSUS ACT DOES NOT PREVENT DISCLOSURE OF THE BUREAU'S VACANCY AND ADDRESS LISTS.

The provisions of the Census Act on which the Bureau bases its claims of privilege impose specific limitations on the Bureau's right to use, publish and distribute for a fee certain categories of census information, and prohibit the disclosure of census questionnaires. They do not create a privilege from disclosure for the vacancy and address lists at issue here. Moreover, even if the claimed privilege were broad enough to cover the withheld documents, the privilege would be a quali-

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[14] These legal defenses were properly rejected in *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 834, 838-39 (2d Cir. 1980).

[15] *See* p. 3 n.3, *supra*.

fied one, and is overridden by the census litigants' need for the documents and the importance of the constitutional rights asserted. And any legitimate confidentiality interest can be adequately safeguarded by an appropriate protective order.

A. Neither Section 9 nor Section 8(b) of the Census Act Applies to the Vacancy and Address Lists.

The Bureau invokes the confidentiality provisions of the Census Act, 13 U.S.C. § 9 (as well as a disclosure for pay provision of the Act, 13 U.S.C. § 8(b)), in support of its argument that its vacancy and address lists are absolutely immune from discovery. That position is flatly inconsistent with both the language and the purpose of the statute: section 9 by its terms does not apply to the materials sought here and, moreover, such materials are sought for the very purpose the statute is designed to attain—assurance of a complete and accurate census.

Section 9 provides that

> "(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purpose of this title, shall require for any reason copies of census reports which have been retained by any such

> establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individuals or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

Like other statutes limiting the disclosure of official information, section 9 must be strictly construed. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961); *see* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Col. L. Rev. 142 (1976). It may not be read to insulate the documents at issue from discovery absent a clear and conclusive expression that Congress intended that result. *Freeman v. Seligson*, 405 F.2d 1326, 1351 (D.C. Cir. 1968). As the court in *Freeman* stated:

> "The primary principle of according justice to litigants, dependent on ascertainment of underlying facts, is not to be subordinated to some other domestic policy as a matter of inference of Congressional intent from ambiguous or inconclusive references. . . . [I]n other instances where Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language." 405 F.2d at 1351.[18]

None of the three subsections of section 9 may be read even by implication to limit the disclosure of the Bureau's vacancy and address lists—and much less so to "conclusively", "expressly" or by "specific language" limit their disclosure.

Subsection 9(a)(1) is inapplicable because it has nothing to do with disclosure, but merely limits the *uses* to which the

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[18] *See* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Col. L. Rev. 142, 151 (1976): "The lesson of the foregoing [official information privilege] cases is that a significant rule of statutory construction has developed: statutes creating official information privilege are to be narrowly construed. Congress must use explicit, unmistakable statutory language if the judiciary is to find privilege."

Bureau may put census "information".[17] By prohibiting Bureau officials from "using" census information for "other than . . . statistical purposes", the provision prevents Bureau personnel, for example, from using their position for personal gain by selling census information to direct mail advertisers. Stretching subsection 9(a)(1)'s prohibition against the "use" of the data to bar the Bureau's compliance with a discovery request in an action challenging the accuracy of the census would violate a common sense, contextual reading of the provision.

Even if compliance with a discovery request in the present cases would constitute a "use" under subsection 9(a)(1), the lists of addresses and vacant units at issue here are sought to be used for a "statistical purpose" identical to the Bureau's: to ascertain whether all housing units have been counted correctly and whether those classified as "vacant" are in fact vacant, and thereby to obtain as complete an enumeration as is practicable. The district court's discovery order in *Carey v. Klutznick* limited Amici's use of the documents to precisely that purpose.[18] Moreover, if § 9(a)(1) barred disclosure as broadly as the Bureau contends, both subsections 9(a)(2) and (a)(3) would be superfluous.

Subsection 9(a)(2) prohibits "publication" of census "data" that could identify any respondent. No publication of

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[17] In addition, much of the information contained on the address lists was not "furnished" under the provisions of this title to the Bureau and thus does not fall within the protection of 13 U.S.C. § 9(a)(1) or (2). Clearly, addresses purchased from commercial vendors and supplemented by post office checks are not "furnished" to the Bureau by any respondents. The Bureau tries to expand the protection of sections 9(a)(1) and 9(a)(2) to include information "gathered" by the Bureau "in the course of enumerating the population". However, the sections protect only responses required of respondents by the Census Act and not information accumulated by the Bureau itself from commercial mailers, the post office or by observation of Bureau enumerators.

[18] The Bureau's extraordinarily broad reading of subsection 9(a)(1) is also inconsistent with its common sense behavior during the 1980 Census. For example, on many occasions during the 1980 Census, New York Regional Office employees instructed district office personnel to use the registers as mailing lists for recruitment of enumerators, clearly not a statistical purpose for which the information was furnished.

the lists has been sought or ordered. The Census Act itself, 13 U.S.C. § 302, recognizes the distinction between "publication" and the disclosure sought here.[19] Moreover, where, as in *Carey v. Klutznick*, disclosure is ordered pursuant to protective provisions requiring the redaction of names from the documents, subsection 9(a)(2) is inapplicable because there is no possibility that particular respondents could be identified.

Arguments attempting to convert a statutory prohibition against "publication" into a bar against disclosure have consistently been rejected by the courts. In *Rosee v. Chicago Board of Trade*, 35 F.R.D. 512 (N.D. Ill. 1964), the Secretary of Agriculture resisted the production of agency documents which reflected the trades and trading positions of numerous private individuals, arguing that Section 8 of the Commodity Exchange Act, 7 U.S.C. § 12 (1968) (amended 1978), prohibited disclosure. By its terms, the statute prohibited the "publication" of "data and information which would separately disclose the business transactions of any person and trade secrets or names of customers." In holding that section 8 did not prohibit the disclosure of the documents, the court explained:

> "While the section restricts the data which the Secretary of Agriculture may 'publish', its language would not appear to relate to disclosures pursuant to discovery proceedings under the Federal Rules of Civil Procedure and subject to supervision by the Court. Disclosure in these instances is not a publication. . . . Where Congress has intended to proscribe the use of government-held data in judicial proceedings, it has not talked in terms of 'publish' or 'publication'. Rather, it has expressed the prohibition explicitly."[20] 35 F.R.D. at 515.

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[19] Section 302 of the Act permits the Secretary to make rules "for such confidentiality, *publication*, or *disclosure*, of information collected hereunder as he may deem necessary. . . ." 13 U.S.C. § 302 (emphasis added). Thus, even if "publication" were prohibited by § 9(a)(2), "disclosure", which the Act itself distinguished from "publication", would not be prohibited.

[20] The court in *Rosee* (35 F.R.D. at 515) cited numerous examples of statutes which—in marked contrast to the Census Act—explicitly prohibit disclosure of data in judicial proceedings:

See Merchants National Bank and Trust Co. v. United States, 41 F.R.D. 266, 268 (D.N.D. 1966). Similarly, in *Freeman v. Seligson, supra*, the D.C. Circuit, relying on *Rosee*, ordered disclosure of agency documents which the Secretary of Agriculture claimed to be privileged under Section 8 of the Commodity Exchange Act. That court concluded:

> "[L]imited disclosure in judicial proceedings, carefully curtailed by judicious use of protective orders authorized by Rule 30 [now Fed. R. Civ. P. 26], is not a publishing barred by the section. . . . In the absence of a specific prohibition against disclosure in judicial proceedings, such as Congress set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice. That kind of indication is not provided by § 8, where both the language used and the statutory setting plainly reflect Congressional concern with widespread dissemination of information not otherwise available to the public, and not with disclosure in judicial proceedings." 405 F.2d at 1348-49 (footnote omitted).

Subsection 9(a)(3) is also inapplicable to the vacancy and address lists because it protects only "individual reports"—i.e., census questionnaires. No plaintiff in a census case has sought to discover census questionnaires, and no district court has ordered them produced.

In addition to the confidentiality provisions of section 9, the Bureau seeks to invoke a *disclosure* provision of the Act, section 8(b), in aid of its confidentiality claims. Section 8(b) provides, in pertinent part:

> "Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of

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Federal Aviation Act of 1958, § 701, 49 U.S.C. § 1441(e); Act of May 6, 1910, c. 208, § 4, 36 Stat. 351 (1910), 45 U.S.C. § 41 (railroad accident investigations); Act of August 10, 1956, c. 1041, 70A Stat. 748 (1956), 10 U.S.C. § 7724 (information regarding naval vessels); P.L. 85-857, September 2, 1958, 72 Stat. 1236 (1958), 38 U.S.C. § 3301 (information in Veterans' Administration records).

> tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies and establishments of the Federal Government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) . . . state or local agencies, or other public and private persons and agencies, upon payment of the actual or estimated cost of such work."

In arguing that section 8(b) bars disclosure to litigants of the sort of lists at issue here, the Bureau simply misreads the statute. Section 8(b) constitutes a *grant* of power enabling the Secretary of Commerce to make and furnish copies of certain tabulations, statistical materials, compilations and surveys to various public and private entities, and to do so for a fee. The subsection has no bearing on what information may be disclosed under compulsion of law. The restrictive language on which the Bureau relies is merely a limitation on the Secretary's power which, especially under the rigorous standards set forth in *Freeman, supra,* cannot be converted into a source of privilege to support the Bureau's refusal to disclose its vacancy and address lists.

Moreover, section 8(b) makes it even clearer that the Bureau's reading of section 9 is too broad. All the disclosures authorized by section 8(b) are expressly made "[s]ubject to the limitations contained in" section 9. Certain disclosures are subject to the additional requirement that they "not disclose the information reported by, or on behalf of, any particular respondent". If section 9 were as broad as the Bureau claims, that added requirement would be mere surplusage, a result that Congress cannot be presumed to have intended.

In addition to the plain meaning of the confidentiality provisions, both case law and legislative history demonstrate that defendants' privilege argument is much too broad. *St.*

Regis Paper Co. v. United States, supra, involved file copies of a company's census reports. Confidentiality under section 9 was asserted because the copies contained the same information that had been submitted to the Bureau in the original report. (At that time, section 9 was identical to the present version except that it did not explicitly protect *copies* of individual reports.) Requiring that section 9 be strictly construed, this Court held that only the actual report filed with the Bureau was confidential; the "information" contained in the report, and therefore the copy, was not privileged. 368 U.S. at 217-18. This Court rejected arguments which echo those made by the Bureau here that allowing disclosure of the information would "chill" responses to the Census and would contradict the "legend" of confidentiality appearing on the census forms, concluding that:

> "Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. That this statute does not do." 368 U.S. at 218.

Following the *St. Regis* decision, Congress amended section 9 to make *copies* of individual reports retained by census respondents "immune from legal process". At that time, Congress considered rewriting section 9 to extend that privilege from disclosure to "information" and "data" contained in the reports,[21] but rejected that option in the face of opposition from all sides, including the Bureau itself.[22] The inclusion in section 9, as amended, of a "specific prohibition against disclosure in judicial proceedings", *Freeman, supra,* 405 F.2d at 1348, covering census questionnaires underscores the lack of any similar prohibition covering the documents at issue here.

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[21] *See H.R. Rep.* No. 10569, 87th Cong., 2d Sess. (1962), *printed in, Hearing Before the Comm. on Post Office and Civil Service,* Confidentiality of Census Reports, 87th Cong., 2d Sess. 10 (1962) (hereinafter "Hearings").

[22] *E.g.,* Letters from Bureau of the Budget, Federal Trade Commission, Justice Department, and Commerce Department, *Hearings* at 4-5, 8, 15-16, 26-27, 29.

In the only post-amendment case addressing the issue of confidentiality under section 9 in a relevant context,[23] the court examined the legislative history surrounding the 1962 amendment and stated:

> "The House Committee considering the amendment specifically rejected language that would have made census 'information, reports and other data' immune from legal process, thus clearly undermining appellants' assertion that Congress conferred such broad protection. *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 699 (D.C. Cir.) (per curiam), *cert. denied*, 439 U.S. 958 (1978).

B. Even If The Confidentiality Provisions of the Census Act Apply to the Documents At Issue, Those Provisions Merely Establish a Qualified Privilege Which is Outweighed by the Paramount Constitutional Interest in Disclosure Here.

Even if the language of section 9 were stretched to cover the vacancy and address lists at issue, the documents would still have to be disclosed under circumstances like those in *Carey v. Klutznick*. Courts that have considered the extent of privileges established by statutes like section 9 have consistently concluded that the privilege is not absolute, but qualified. As the United States Court of Appeals for the District of Columbia explained:

> "Determining that [allegedly privileged documents] are confidential reports is but a first, albeit important, step. The legal authorities which create the confidential report privilege divide into three categories. The first type

[23] The instant case is entirely different from *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), relied on heavily by the Bureau. In *Seymour*, the plaintiff sought disclosure under the Freedom of Information Act of the *names* and addresses of certain businesses—and did so for the purpose (inconsistent with subsection 9(a)(1)) of notifying potential class members of two antitrust actions. In that context, the Bureau's claim of privilege was properly sustained.

> expressly privileges documents from disclosure in judicial proceedings, and may result in a complete bar to discovery. The second type specifically provides that confidential reports must be furnished to a requesting court. The third, and largest category is composed of authorities such as those in issue here, which bar disclosure without specifying from whom they are to be withheld.
>
> "In our view, authorities of this third type create a qualified privilege . . . ."

Association for Women In Science v. Califano, 566 F.2d 339, 346 (D.C. Cir. 1977) (footnotes omitted); *see Freeman v. Seligson*, 405 F.2d 1326, 1339-40 (D.C. Cir. 1968); *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 389 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

Since section 9 similarly fails to identify "from whom [confidential documents] are to be withheld", it falls within the third category, and any privilege it creates is merely a qualified one. Thus, in determining whether to compel disclosure, a court must balance the benefits which will flow from the disclosure of the vacancy and address lists against the potential harm of such disclosure. *Association for Women In Science, supra*, 566 F.2d at 346; *see Freeman, supra*, 405 F.2d at 1340; *Carr, supra*, 431 F.2d at 389. In performing this weighing process, the courts must remember that:

> "[t]he principle favoring full access . . . to relevant information, in the absence of strong competing considerations, is an important foundation for the achievement of justice . . . [and] clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice."

Association of Women In Science, supra, 566 F.2d at 346; *Freeman, supra*, 405 F.2d at 1348; *Carr, supra*, 431 F.2d at 390 ("The possibility of harm to an administrative program and the invasion of privacy of persons who seek employment cannot be

ignored. But in nearly every case involving similar state statutes, the balance has been struck in favor of disclosure in court proceedings.")

In the present cases, the balance weighs heavily in favor of disclosure. As detailed above, the vacancy and address lists at issue are extremely important in showing the magnitude of the census undercount. Especially in cases such as these involving alleged violations of fundamental constitutional rights, the interest of a government agency in preserving the confidentiality of its work must yield to the paramount interests of citizens seeking to vindicate those rights.

Furthermore, any potential harm which the Bureau might allege can be compensated for by the entry of appropriate protective orders. In *Freeman v. Seligson, supra,* the Secretary of Agriculture attempted to establish a qualified privilege for government documents on the basis of hypothetical injuries that might have resulted from their disclosure—much like the Bureau's allegations in the instant cases. In ordering disclosure, the court explained:

> "There is no reason why the court cannot also ensure that this information is not released by appellee. The courts routinely handle situations where litigation discovery trenches on competitors' rights to secrecy by using their powers under Rule 30 [now Rule 26]. The courts can limit, and in actual practice do limit, the persons having access to information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put. No great outcry has arisen that information thus restricted has been leaked, or put to improper uses, by attorneys who are sworn officers of the court." 405 F.2d at 1550.

See Carr v. Monroe Manufacturing Co., 431 F.2d 384, 390 (5th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971).

In *Carey v. Klutznick,* for example, the district court's discovery order protected against any harmful consequences which could reasonably be claimed to result from disclosure to

counsel of the vacancy and address lists. As suggested in *Freeman*, the court "limit[ed] the persons having access to information, their freedom to discuss the information, and the uses to which the information may be put". The discovery order limited the use of the documents to "helping to ensure an accurate count of the whole number of persons in New York in the decennial census", banned disclosure of the documents except as necessary to achieve that purpose, and required redaction of names from the documents. Finally, the order included a direction that

> "any person granted access to the documents produced pursuant to this Order shall be sworn to confidentiality pursuant to 13 U.S.C. § 23(c)".

Section 23(c) of the Census Act provides:

> "The Secretary may utilize temporary staff, including employees of Federal, State or local agencies or instrumentalities, and employees of private organizations to assist the Bureau in performing the work authorized by this title, but only if such temporary staff is sworn to observe the limitations imposed by section 9 of this title."

This section specifically authorizes utilization of local officials who, pursuant to the order, would be "performing the work authorized" by Title 13—helping ensure that all persons in their localities are counted.[24] Therefore, the confidentiality interests of the Bureau were adequately protected by the protective order entered in *Carey v. Klutznick* and such interests can be protected in other census cases by the entry of a similar order.

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[24] The Bureau's argument that the district court's order that state and local employees be sworn to confidentiality indicates that the address lists fall within the scope of Section 9 is completely without merit. The protective order formulated by the district court carefully limited the terms of the disclosure to ensure that none of the limitations on census information delineated in Section 9 were violated. Imposition of additional safeguards hardly indicates that but for the oaths the provisions of Section 9 would have been violated.

The absolute privilege with which the Bureau seeks to cloak its vacancy and address lists is thus a chimera. The statutes simply do not support it. The Bureau's own treatment of the withheld documents belies it. The importance of the documents to the litigants, and the importance of the constitutional rights at stake in the census cases, mandate that whatever privilege exists—and none does—be subordinated to the paramount interest of the litigants in the documents' disclosure. The Bureau's asserted interest in maintaining the "integrity of census data" is hardly sufficient to raise a privilege where none exists, and is safeguarded in any case by the judicious use of protective orders. If that protection is insufficient, the Bureau's appeal must be to the Congress and not to the courts. Under the existing statutory scheme, as much as the Bureau would have it otherwise, vacancy and address lists are not among the documents the Bureau is privileged to withhold from litigants seeking to test the accuracy of the census.

CONCLUSION

The Bureau of the Census should be required to produce its vacancy and address lists as necessary to subject challenged census results to review by the courts.

September 11, 1981

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 947—September Term, 1980

(Argued February 20, 1981 Decided June 12, 1981)

Docket No. 81-6042

HUGH L. CAREY, et al.,

Plaintiffs-Appellees,

—v.—

PHILIP M. KLUTZNICK, et al.,

Defendants-Appellants.

Before:

VAN GRAAFEILAND and MESKILL, *Circuit Judges,*
and STEWART, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York following a nonjury trial before Werker, *J.*, which directed the Census

* Of the Southern District of New York, sitting by designation.

Bureau to adjust population figures for the State and City of New York. Reversed and remanded for a new trial.

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VAN GRAAFEILAND, *Citcuit Judge:*

When the first federal census was conducted in 1790, the total population of the United States was less than 4,000,000.[1] New York City, the country's largest municipality, had only 33,000 inhabitants.[2] Despite these relatively small numbers, the census, which was conducted by United States Marshals, did not go smoothly. Transportation and communication were inadequate.[3] Boundaries of towns and cities were often undefined.[4] Cooperation by the citizenry was less than complete. Some people distrusted the newly-formed federal government; others were

1 C. Wright & W. Hunt, *The History and Growth of the United States Census* 17 (1900).

2 U.S. Dep't of Commerce, *The Story of the Census, 1790-1916* 8 (1916).

3 *Id.*

4 *Id.* at 9.

influenced by a fear of increased taxation; many opposed the basic concept of a census.[5]

Because art. 1, § 2, cl. 3 of the then newly-enacted Constitution provided that members of the House of Representatives and direct taxes should be apportioned among the States according to population, it had been anticipated that the census would provide an accurate count. A State's temptation to exaggerate its population count for purposes of congressional representation would be offset by its desire to reduce its apportioned share of direct taxes.[6] However, when the census was finally completed in 1791, there was a fairly wide-spread belief that it had resulted in a substantial undercount.[7]

Although the mechanics of the counting process have been improved in each of the nineteen ensuing censuses, there has never been a perfect count.[8] This is concededly true of the 1980 census. In keeping with the spirit of the times, States and municipalities in various parts of the country are seeking to remedy this most recent imperfection through litigation.[9] Approximately fifty lawsuits have been brought by or on behalf of subordinate govern-

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5 *Id.*

6 C. Wright & W. Hunt, *supra* note 1, at 13 n.a.

7 *Id.* at 16; The Special Committee on Empirical Data in Legal Decision Making, "The Undercount of the Census", 36 *The Rec. of the Ass'n of the Bar of the City of New York* 24 (1981).

8 *Gaffney v. Cummings*, 412 U.S. 735, 745 n.10 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 539 n.3 (1969) (Fortas, *J.*, concurring).

9 The deterrent effect of direct tax apportionment on State claims of undercount has, of course, been eliminated by the passage of the Sixteenth Amendment.

ment bodies, in each of which the claim of a substantial local or regional undercount is made.[10]

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10 The inundating effect of this spate of litigation can perhaps best be demonstrated by simply listing the cases involved: *Goodman v. Klutznick*, No. 81-70193 (E.D. Mich.); *Dona Ana County v. Klutznick*, Civ. No. 80-676 M (D.N.M.); *Del Bello v. Klutznick*, No. 80 Civ. 7195 (S.D.N.Y.); *Board of Commissioners v. Klutznick*, No. C-1-81-029 (S.D. Ohio); *Overstreet v. Baldridge*, No. J-81-0007-Civ. (D. Alas.); *Cole v. Klutznick*, No. 81-0049-P.G. (D.P.R.); *Fahy v. Klutznick*, No. 81-617 (D.N.J.); *Sharrow v. Reagan*, No. 81 Civ. 1953 (S.D.N.Y.); *Connell v. Baldridge*, No. Civ. 81-5029-CV-SW (W.D. Mo.); *Meyers v. Baldridge*, No. B-8161-CA (E.D. Tex.); *Munzert v. Baldridge*, No. 80-5369 (S.D. Ill.); *Louisiana v. Klutznick*, No. 81-004-A (M.D. La.); *Spanish Coalition for Jobs v. Klutznick*, No. 80 C 2994 (N.D. Ill.); *New Jersey Apportionment Commission v. Department of Commerce*, No. 81-309 (D.N.J.); *Clark v. Klutznick*, No. 80-4153 (D.N.J.); *City of Hobbs v. Klutznick*, No. 80-792 (D.N.M.); *Sullivan v. Klutznick*, No. A-80-397-Civ. (D.Alas.); *McLaughlin v. Klutznick*, No. 81-7 (D. Del.); *City of College Park v. Klutznick*, No. C-80-2252-A (N.D. Ga.); *City of East Point v. Klutznick*, No. C-80-2227-A (N.D. Ga.); *Hatcher v. Klutznick*, No. H-80-742 (N.D. Ind.); *Conway v. Klutznick*, No. 80-1549-C(3) (E.D. Mo.); *Krodinger v. Klutznick*, No. 80-1636-C(1) (E.D.Mo.); *DeFino v. Klutznick*, No. 80-3896 (D.N.J.); *Gibson v. Klutznick*, No. 80-3438 (D.N.J.); *Jasienski v. Klutznick*, No. 80-4142 (D.N.J.); *New Mexico v. Klutznick*, No. 80-0726-C (D.N.M.); *Lewis v. Klutznick*, No. 80-862-Civ-5 (E.D.N.C.); *Red Lake Bank of Chippewa Indians v. Klutznick*, No. 6 80-644 (D. Minn.); *Drakeford v. Klutznick*, No. C-80-645D (M.D.N.C.); *Padilla v. Klutznick*, No. 80-2570 (D.P.R.); *City of Willacoochee v. Baldridge*, No. CV 581-05 (S.D. Ga.); *City of Terre Haute v. Klutznick*, No. TH 80-242-C (S.D. Ind., dismissed Jan. 29, 1981); *City of Chester v. Klutznick*, No. 80-3309 (E.D. Pa.); *Ferre v. Klutznick*, No 80-2933 (S.D. Fla.); *City of Duluth v. Klutznick*, No. 5-80-150 (D. Minn.); *City of Atlanta v. Klutznick*, No. C-80-1685A (N.D. Ga.); *Massachusetts v. Klutznick*, No. 80-2232-Z (D. Mass.); *City of Owensboro v. Klutznick*, Civ. No. 80-0201-0(J) (W.D. Ky.); *Carey v. Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 22, 1980), *appeal argued*, No. 81-6042 (2d Cir. Feb. 20, 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980), *appeal dismissed*, N. 80-2375 (7th Cir. Dec. 31, 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *appeal docketed*, No. 80-1751 (6th Cir. Dec. 24, 1980), *stay* granted, No. A-533 (U.S. Dec. 24, 1980); *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo., Sept. 17, 1980), *rev'd*, No. 80-2023 (10th Cir. April 17, 1981); *City of Cincinnati v. Klutznick*, *No. C-1-80-475* (S.D. Ohio), dismissed Sept. 11, 1980); *City of Baltimore v. Klutznick*, Civ. No. Y-80-2196 (D. Md.), dismissed Aug.

This is an appeal from a judgment of the United States District Court for the Southern District of New York in an action alleging undercounts in the State and City of New York. The judgment orders the Census Bureau to adjust population figures for the State and City "in a reasonable and scientific manner" and to report to the court within thirty days the Bureau's plan to effectuate the court's ruling.[11] For reasons hereafter assigned, we reverse and remand for a new trial.

Although the census is the delight of statisticians and sociologists and serves as a convenient measuring stick for the dispensing of federal funds, it was not created for those purposes. Its purpose under the Constitution was to determine the apportionment of Representatives among the States. "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ."[12] In reviewing the judgment on appeal, it is important that we keep this basic constitutional purpose in mind.

The House of Representatives has 435 members, and this number must be apportioned among the fifty States.

29, 1980); *Holland v. Klutznick*, No. 80-73302 (E.D. Mich.); *Shapiro v. Klutznick*, No. 80-2638 (D.N.J. Aug. 29, 1980), *aff'd mem.*, No. 80-2466 (3d Cir. Dec. 1, 1980), *stay granted*, 49 U.S.L.W. 3442 (U.S. Dec. 9, 1980) (No. A-490), *cert. granted*, 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436); *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge court), *appeal dismissed*, 48 U.S.L.W. 3820 (U.S. June 17, 1980), *aff'd per curiam*, No. 80-1246 (D.C. Cir. Nov. 6, 1980), *cert. denied*, 49 U.S.L.W. 3710 (U.S. March 23, 1981) (No. 80-975).

11 The judgment also prohibited the Bureau from certifying New York population totals to the President until the Bureau had fully complied with the judgment. This portion of the judgment was stayed by order of the United States Supreme Court. *Klutznick v. Carey*, 49 U.S.L.W. 3466 (U.S. Dec. 30, 1980) (No. A-567).

12 Art. 1, § 2, cl. 3; *see also* U.S. Const. amend. XIV, § 2; 2 U.S.C. § 2a(a).

If one State gains a member, another must lose one. Following the 1960 census, seven States each gained one seat, one State gained four, and one gained eight. As a result, twelve States each lost one seat, three States each lost two seats, and one State lost three seats.[13] Following the 1970 census, three States each gained one seat, one gained three, and one gained five. Seven States each lost one seat, and two States each lost two seats.[14] In effect, House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. The question presented by litigation such as the one now before us is whether one State can be granted such an increase without full consideration having been given to its effect on other States.

Persons "who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" are traditionally considered to be indispensable parties.[15] Equity suggests that a person be brought into the litigation if the case cannot be decided on its merits without prejudicing his rights.[16] This not only prevents possible injury to the absent person; it

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13 U.S. Dep't of Commerce, *Congressional District Data Book* xi (1963).

14 U.S. Dep't of Commerce, *1972 Statistical Abstract of the United States* 363 (93rd ed. 1972).

15 *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 52 (1954), quoting *Shields v. Barrow*, 17 How. 129, 139 (1854).

16 *Sandobal v. Armour & Co.*, 429 F.2d 249, 257 (8th Cir. 1970); *Gramatan-Sullivan, Inc. v. Koslow*, 240 F.2d 523, 525 (2d Cir.), *cert. denied*, 353 U.S. 958 (1957); Fed. R. Civ. P. 19(a).

avoids multiplicity of suits and the danger of inconsistent decisions.[17]

Although the present action has already been before this Court on an appeal from a preliminary injunction order, we did not consider any of the factors just set forth. The panel hearing that appeal held only that plaintiffs have standing to sue and that the issue of census mismanagement is justiciable rather than political.[18] The panel did not address appellants' contention that the issuance of the preliminary injunction order was an abuse of discretion because it "overlook[ed] the impact on other cities and states."[19] The panel concluded that "[t]he argument that a court decision may provide special treatment for the parties involved is one for the ultimate trial on the merits and decision on appeal."[20] We have now reached that point in the litigation.

We think it clear beyond cavil that a statistically formulated increase in the population of only one State, such as New York, will have an adverse effect on other States

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17 *See Ward v. Louisiana Wildlife & Fisheries Commission*, 224 F. Supp. 252, 256 (E.D. La. 1963), *aff'd*, 347 F.2d 234 (5th Cir. 1965). Because the financial and political effects of population apportionment make it a competitive process, the proper method of determining disproportionate undercount would seem to be on a State vs. State basis, rather than that of State vs. national average. If statistical adjustments are to be made, they should be made in all States where needed and in a uniformly fair manner. This is not apt to occur when claims of disproportionate undercount are made in fifty separate cases, particularly when there is no consensus among the experts as to feasible and accurate methods of adjusting undercounts.

18 *See Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), *stay granted*, 49 U.S.L.W. 3466 (U.S. Dec. 30, 1980) (No. A-567). Despite appellant's urgings, this panel considers itself precluded from reexamining the issues passed on by the prior panel.

19 637 F.2d at 839.

20 *Id.*

which are entitled to, but do not receive, the benefit of a similar adjustment. Even if the increase is insufficient to change House membership, it will nonetheless increase New York's share in the numerous revenue sharing plans that are tied into the census. The adversely affected States therefore fall within the category of parties who should be joined in the instant litigation if feasible.[21] Because compulsory joinder of all fifty States was not feasible in the district court, pragmatic equitable alternatives should have been considered.[22]

The first alternative, which the prior panel of this Court has already rejected, would have been to substitute Bureau and congressional review for that of the court.[23] This is the recommendation of the Association of the Bar's Special Committee on Empirical Data in Legal Decision Making which concludes its report with the following observation:

> The path to a better census is more likely to be found in scrutiny of Bureau procedures by the Bureau itself, Congress, other federal agencies, and interested professional groups than in litigation to compel adjustment.[24]

A second alternative would have been to require that notice of suit be given to all of the States, with permission

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21 *Providence Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968).

22 *Id.* at 106-07.

23 The existence of half-a-hundred separately-sued legal challenges to the 1980 census, *see* note 10, *supra*, indicates that there may be a basic defect in the procedure for census review. If the courts cannot correct this situation, it may be wise for Congress to do so.

24 *See Undercount of the Census*, *supra* note 7, at 47.

to intervene given any State which felt that its interests were imperiled. Apparently, no notice was given anyone; only the County of Suffolk sought intervention, and its application was denied.

A third alternative would have been to seek multidistrict coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. It appears that thirty-one of the above listed actions have been transferred to the District of Maryland for coordinated or consolidated proceedings.[25] The wisdom vel non of adopting a uniform nationwide method of making statistical adjustments might perhaps be fully explored if complete multidistrict joinder were agreed upon.

As a fourth alternative, the district court could have stayed the operation of its judgment pending a definitive appellate ruling as to whether the Census Bureau's conduct of the 1980 census could properly be challenged in fifty separate and unrelated actions and whether the requirements imposed on the Bureau by the district court in this action were proper.[26]

Without passing on the wisdom or necessity of any of the foregoing alternatives, we conclude that, at the very least, the district court was required to conduct the trial in such a manner that the interests of other States and subordinate government bodies were not prejudiced by rulings that prevented a full and fair development of the facts. Because error and prejudice resulted from certain of the district court's discovery orders and the sanctions

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25 *In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J.P.M.D.L. Jan. 16, 1981).

26 *See Providence Tradesmens Bank & Trust Co. v. Patterson, supra*, 390 U.S. at 115.

imposed in connection therewith, for this reason, if for no other, there must be a new trial.

As part of their pretrial discovery, plaintiffs requested disclosure of the Master Address Registers for New York City and every other municipality in the State, together with a listing of all the vacant housing units in every New York State municipality. The Master Address Registers contain information based upon interviews and questionnaires and include data as to householders, house members, street names, apartments or unit numbers, descriptions of location, numbers of units, numbers of persons, etc. The Census Bureau estimated that there are more than 550,000 pages of address registers for the New York region alone. The vacant housing forms, known as D-160 Unit Status Review forms, contain information as to the vacant or occupied status of a unit, as obtained from the owner, custodian, manager, a neighbor, or another individual with knowledge. Between 500,000 and 600,000 D-160 forms are estimated to exist for the New York region. The Bureau took the position that the requested information was confidential, that its disclosure would violate 13 U.S.C. § 9 and would undermine the public confidence needed for the effective conduct of the census.[27]

The district court directed the Bureau to produce the documents in question, the court's sole concession to the Bureau's claim of confidentiality being the grant of permission to redact "only" the names of persons residing in a household. The court ordered that any person granted access to the documents should be sworn to confidential-

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[27] The Bureau did offer, however, to produce D-388 forms, which consisted of page-by-page summaries of all of the D-160 forms, including total housing units, vacant units, unclassified units and population counts on a block-by-block basis.

ity pursuant to 13 U.S.C. § 23(c).[28] Upon the Bureau's refusal to comply with the production order, the district court precluded the defendants from offering any evidence to prove "any fact, matter or circumstance that would be reflected in or could be derived from the [Master Address Registers or D-160 forms] or that could be contradicted or impeached by such documents." Defendants were also precluded from "denying or offering evidence or testimony to disprove" the following allegations in plaintiffs' complaint:

> (a) that there was a disproportionate undercounting of Blacks, Hispanics, other racial and ethnic minorities, legal and illegal aliens, persons whose principal language is other than English and persons living in poverty or high-crime urban areas;
>
> (b) that the persons above described live in New York State or New York City in substantially disproportionate numbers as compared to the nation as a whole; that therefore the undercount for New York will be substantially higher in percentage terms than it will be for the rest of the United States and in absolute numbers it will be larger than the undercount for any other State;
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> (c) that the 1980 census operations in New York, and particularly in New York City, have been carried out in a manner that will greatly exacerbate the un-

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28 Section 23(c) provides that the Secretary of Commerce may utilize a temporary staff to assist the Census Bureau in performing its work, but only if such temporary staff is sworn to observe the limitations imposed by 13 U.S.C. § 9. It would appear that if plaintiffs' attorneys are sworn to confidentiality pursuant to the provisions of this section, they will be in the enviable, but legally uncomfortable, position of becoming part of the Bureau's temporary staff.

dercount in New York as compared to other parts of the nation;

(d) that the particular difficulties encountered by the Census Bureau and the poor management of census operations in New York State, and especially New York City, have made judicial relief essential;

(e) that the Census Bureau with knowledge of the difficulties it would encounter in New York State and New York City and with knowledge that undercounting would be disproportionately severe there, especially among the class described in paragraph (a) above, knowingly and intentionally failed to devote adequate resources to develop special plans and procedures, to assign the most qualified personnel and to carry out their own planned procedures in New York State, and particularly New York City;

(f) that the first follow-up operations in New York State and New York City were also seriously mismanaged (Six paragraphs, covering four printed pages in the Appendix, set forth alleged examples of mismanagement under this general allegation of wrongdoing);

(g) that the second follow-up operations were not being adequately staffed or managed in New York; they were not designed to count additional households, correct inaccuracies in the size of households, or to recheck the casual count inaccuracies;

(h) that the local review program was being improperly conducted by an inadequate staff and the City had been given neither adequate time nor adequate information to review and challenge the results.

Looking first to the discovery order, we conclude that it was improvidently granted. In *McNichols v. Klutznick*, No. 80-2023 (10th Cir. April 17, 1981), one of the actions pending in other jurisdictions, the district court had granted the identical relief ordered by the court below. The Court of Appeals reversed, stating that "[b]oth the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality."[29] Although the Third Circuit appears to have taken a contrary position,[30] we agree with the holding of the Tenth Circuit.

Assuming for the argument, however, that the court below did not err in granting discovery, it clearly abused its discretion in the imposition of sanctions. As already pointed out, New York is seeking to gain an advantage over other States in the competition for congressional seats and federal funds. The extremely broad sanction order punished these unrepresented States by preventing full and fair disclosure of the facts and an adjudication on the merits of plaintiffs' claims.[31] The severity of sanctions should be tempered by a consideration of the equities involved.[32] The equities in the instant case dic-

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29 *McNichols v. Klutznick*, No. 80-2023, slip op. at 3-4 (10th Cir. April 17, 1981). See *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977), where the court said that the provisions of section 9(a) are a "flat barrier to disclosure with no exercise of discretion permitted."

30 *Shapiro v. Klutznick*, No. 80-2466 (3d Cir. Dec. 1, 1980) (mem.), *cert. granted*, 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436).

31 Because of the sweeping effect of the district court's sanction, we are not even told what New York City's census count was.

32 *Williams v. Krieger*, 61 F.R.D. 142, 145 (S.D.N.Y. 1973).

tated that the unrepresented States not be penalized because the Census Bureau was attempting to recognize the public's interest in a confidential census.

Reversed and remanded for further proceedings consistent with this opinion.

STEWART, *District Judge* (concurring in the judgment):

Although I concur in the judgment, I write to express my disagreement with the court's analysis in overturning the order of the district court that the follow-up address registers (FARs) and D-160 Unit Status Review forms be disclosed to the plaintiffs with limitations. I also consider the scope and the effect of the holding overturning the preclusion order.

I.

The statutory privilege raised by appellants as a barrier to disclosure is substantial and undoubtedly necessary. However, I do not believe that the statute under which the government claims an absolute privilege from disclosure is so broad as to protect most of the information sought by plaintiffs from the limited disclosure ordered below.[1]

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[1] As there is no disagreement concerning the relevance of the information to appellees' case, I confine my discussion to the question of privilege. If the information sought is absolutely privileged, or if the information is qualifiedly privileged and the disclosure is not warranted, the discovery order must be reversed. If the information is not privileged, or if the qualified privilege is overcome, the discovery order must be upheld.

A.

The starting point in analyzing the scope of a statutory privilege must be the text of the statute, *see United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 277-78 (1929), and the statute must be strictly construed. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961). The defendants bear the burden of proving that a privilege exists. *Heathman v. United States District Court*, 503 F.2d 1032, 1033 (9th Cir. 1974) (citing 8 Wright & Miller, Federal Practice & Procedure: Civil, § 2016 at 126).

The statute in question provides:

> § 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual.

> Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence, or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. § 9(a) (1976). Appellants contend that the statute extends confidentiality to "all information or data provided to the Census Bureau under the Act." Appellants' Br. at 53-54.[2] The opinion of the court merely endorses the holding of the Court of Appeals for the Tenth Circuit that "the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality." Slip op., *supra*, at 11, *quoting McNichols v. Klutznick*, No. 80-2033, slip op. at 3-4 (10th Cir. March 17, 1981), *petition for cert. filed sub nom., McNichols v. Baldridge*, 49 U.S.L.W. 3826 (U.S. April 24, 1981) (No. 80-1781). The express terms of the statute are not so broad. Subsection 9(a)(1) limits the use of "information furnished under the provisions of this title" to statistical purposes. This provision recognizes the purpose of the census as merely gathering sociological data rather than enabling law enforcement or dictating substantive policy. Subsection 9(a)(2) protects the confidentiality of respondents in the enumerated population by prohibiting dissemination of information identified with "any particular establishment or individual" beyond offi-

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[2] Citations to the briefs of the parties will be recorded as "Appellants' Br. at . . .", "Appellees' Br. at . . .", and "Appellants' Reply Br. at . . . ." The Joint Appendix Volumes I-X are referred to by page number as "A. . . . ."

cers or agents of the Department of Commerce or the Bureau. This is also consistent with the benign, data gathering function of the census. Subsection 9(a)(3) is more restrictive than § 9(a)(2), limiting access to individual reports to "officers and employees of the Department or bureau." Thus, the express protection of the statute is circumscribed: (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents; and (3) no one without statutory authority may peruse individual reports.

Moving beyond the language of § 9, its legislative history does not support appellants' all-embracing interpretation. Appellants identify as indicative of the "strong congressional intent against all disclosure" the swift reaction of Congress to the decision of the Supreme Court in *St. Regis Paper Co., supra.* Appellants' Br. at 51 n.*. The Court had decided that, as written, § 9 did not protect copies of census questionnaires voluntarily retained by respondents. 368 U.S. at 218. Within one year Congress adopted the flush language following § 9(a)(3)[3] to overrule *St. Regis Paper Co.* The legislative history pertaining to the amendment shows its limited purpose.

> The purpose of this legislation is to provide specifically that company-retained copies of census reports submitted to the Bureau of the Census shall have the same confidential status which is afforded to the original census reports . . . .

S.Rep. No. 2218, 87th Cong., 2d Sess. 2 (1962), *reprinted in* [1962] U.S. Code Cong. & Ad. News 3188, 3189. The Department of Commerce request for enactment of this

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3 The text of the statute appears at pp. 1-2, *infra.*

measure stated that, with the requested amendment, " . . . a respondent will be free to give information to Census for statistical purposes only, without fear that a copy of the return can be demanded by a regulatory agency and used against the respondent." Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Jonson, *reprinted in* [1962] U.S. Code Cong. & Ad. News 3190, 3191. The relationship between respondents and the Bureau is repeatedly emphasized in Secretary Hodges' letter. *Id.* The statutory response to *St. Regis Paper Co.* was thus confined to the narrow holding of the case.

Although the *St. Regis* Court was specifically concerned with the relative protection afforded census forms retained by respondents and those held by the Census Bureau, the Court stated that "the prohibitions against disclosure contained in § 9 . . . do not purport to generally clothe census information with secrecy." 368 U.S. at 217-18. The Court analyzed each of the three subsections of 13 U.S.C. § 9 in the same manner as I have done here. *Id.* at 215-16. The strict construction given to § 9 by the Supreme Court did not occasion any fundamental rethinking or clarification of the statute. The statute could have been amended to include a blanket prohibition on dissemination of the information obtained by the Bureau from any source, for any purpose. It was not so amended. In fact, the Committee on Post Office and Civil Service of the House of Representatives expressly rejected a statutory revision that would prevent use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. H.R. Rep. No. 2437, 87th Cong., 2d Sess. 1-2 (1962). *See also* H.R.Rep. No. 10569, 87th Cong., 2d Sess. (1962), printed in Hearing Before the Comm. on Post Office and

Civil Serv., Confidentiality of Census Reports, 87th Cong., 2d Sess. (1962).

The limitation of confidentiality to information furnished to the Bureau by census respondents was emphasized in an early predecessor to § 9 which authorized the Director of the Census to collect and publish statistics relating to cotton seed. *See* Act of Aug. 7, 1916, Pub.L. No. 64-177, ch. 274, § 2, 39 Stat. 436 (1916) ("1916 Act"). The 1916 Act provided "[t]hat the *information furnished by any individual establishment* under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied." *Id.* (emphasis added).

I also derive support for this interpretation of § 9 from the express language of 13 U.S.C. § 8, a statute empowering the Secretary of Commerce to make certain disclosures subject to the limitations of § 9. Subsection 8(b) permits disclosure of tabulations or statistical materials "which do not disclose the information *reported by, or on behalf of, any particular respondent.*" *See McNichols v. Klutznick, supra,* slip op. at 5 (emphasis added), *petition for cert. filed sub nom., McNichols v. Baldridge,* 49 U.S.L.W. 3826. Subsection 8(b) is entirely consistent with § 9(a) in seeking to protect the identity of census respondents. Subsection 8(c) illustrates another means of protection for census respondents. The information furnished to any respondent or government unit under § 8 may not "be used to the detriment of any respondent or other person to whom such information relates." 13 U.S.C. § 8(c) (1976).

I can only conclude that the privilege conferred by § 9 is not as broad as the court's opinion states. Nonetheless, the express language of the statute amply protects the confidentiality interests of census respondents and pro-

motes the purposes of accurate enumeration of the population. *See In re FTC Corporate Patterns Report Litigation*, 432 F.Supp. 291, 305 (D.D.C. 1977), *aff'd sub nom. Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 699 (D.C. Cir. 1978).

Broadening our search for the limits of the statutory privilege conferred by 13 U.S.C. § 9(a) to include judicial construction of the statute does not materially alter this picture of substantial, but finite, confidentiality. Defendants rely heavily on *Seymour v. Barabba*, 559 F.2d 806 (D.C.Cir. 1977) (per curiam), for the absolute confidentiality of matter gathered by the Bureau, whether or not the data is reported to the Bureau by census respondents. *Seymour* held that the Bureau did not have to disclose to third parties the names and addresses of companies falling within 21 of the Bureau's "standard industrial classifications." *Id.* at 809. The information was sought to notify potential class members of an antitrust suit. Plaintiff argued that the names and addresses were not furnished under the Census Act and were not gathered for statistical purposes. With respect to the latter point, the opinion reasoned that names and addresses are "sufficiently related to the statistical data which the firms eventually are called upon to report that it is protected under Section 9(a)(1)." *Id.* The statistical purpose of collecting names and addresses for standard industrial classifications is apparent: it permits cross-checking data to avoid double counting while ensuring completeness. To the extent that the *Seymour* Court found names and addresses could not be disclosed without violating the statutory proscription of use of "information furnished under this title" for other than statistical purposes, I agree with its holding. I cannot agree with *Seymour*, however, that information "gathered," "categorized and

assembled" for the Bureau, but not reported by census respondents, acquires statutory protection. My reading of the statute and its purpose, as described above, of ensuring respondents' privacy, leads to the conclusion that "information furnished under the provisions of this title" means information obtained from the enumerated population.

This latter construction was adopted by Judge Weinfeld in *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958). Judge Weinfeld found that the "clear and unambiguous" purpose of the statute "was to protect [citizens] who complied with the command of the statute." *Id.* at 570. *United States v. Littles*, 321 F.Supp. 388 (D.Del. 1971), also focussed on the origin of the census data and its use, not merely on the Census Bureau as the repository of any information:

> . . . [T]he information obtained by the census questionnaire is strictly confidential. 13 U.S.C. § 9. It may not be used other than for statistical reporting, and may never be disclosed in any manner so as to identify any individual who has answered the questions.[4]

Id. at 392. In *Littles*, the court declined to dismiss an information charging the defendant with refusal to answer census questions. *Id.* The court relied on the statutory privilege protecting respondents' confidentiality in denying defendants' claim that the census questionnaire was an unconstitutional invasion of privacy.

See also Doe v. McMillan, 459 F.2d 1304, 1326 n.15 (D.C.Cir. 1972) (Skelly Wright, C.J. dissenting), *rev'd in part, aff'd in part, and remanded*, 412 U.S. 306 (1973) (Census Act "forbids public dissemination of information obtained by census takers").

B.

It remains to assess the discovery order in this case in light of the specific and limited provisions of 13 U.S.C. § 9(a). The discovery order provided:

> [T]hat [appellants] shall produce to [appellees] by September 10, 1980, the FARs for the City and State of New York for use in checking the accuracy of [appellants'] conduct of the 1980 decennial census except that as to those Census Bureau District Offices in New York State which have been closed or from which FARs have been removed by the Census Bureau, the FARs for those offices shall be produced to the [appellees] by September 12, 1980; and it is further
>
> ORDERED that [appellants] shall produce to [appellees] by September 10, 1980, for use in checking the accuracy of [appellants'] conduct of the 1980 decennial census:
>
> (a) all lists compiled by the Census Bureau of vacant or nonexistent household units in the City and State of New York; and
>
> (b) all Census Bureau D-160 forms for housing units in the City and State of New York other than those indicating that the household unit is occupied; and it is further
>
> ORDERED that [appellees] and their attorneys shall use the documents produced pursuant to this order solely for the purpose of helping to ensure an accurate count of the whole number of persons in New York in the 1980 decennial census, and such documents shall not be used or disclosed to any other

person for any other purpose whatsoever; and it is further

ORDERED that any person granted access to the documents produced pursuant to this Order shall be sworn to confidentiality pursuant to 13 U.S.C. § 23(c); and it is further

ORDERED that in producing the documents required herein, [appellants] may redact such documents to remove from them only the names of persons residing in any household enumerated in the 1980 decennial census; and it is further

ORDERED that [appellants'] motion for a protective order is granted to the extent provided herein, and is in all other respects denied; . . . .

A.281-83.

I turn first to the FARs. The FARs at issue were completed in six steps. First, addresses were purchased from the commercial mailing firms "that supplied the best list for the area." A.437. That included 2,279,000 addresses. A.449. Second, because the commercial lists ("TARs") were known to be deficient, the TARs were compared to the 1970 census address list and 255,000 addresses were added. A.437, 449. Third, the addresses were printed on post cards and checked by the Post Office for address correction, duplication, business only, undeliverables and address missing. A.437. This added 458,000 addresses. A.449. Fourth, in a "precanvass" operation, enumerators checked the special address registers in the field to verify the accuracy of addresses, to identify missing units and to correct geographic errors. A.437. Precanvass added an additional 219,000 addresses to the master mailing lists. A.449. Fifth, another round of

postal checks followed. A.437. Sixth, the FARs were up-dated after questionnaires were mailed out and either mailed back or answered by a personal visit or answered by the enumerators if no response was obtained. A.266-267.

It follows from the foregoing analysis of the statutory privilege that information obtained at the first, third, fourth and fifth steps is not privileged.[5] Most importantly, the information sought at these steps was not supplied by census respondents. It is also significant that the information was to be used only for statistical purposes—according to appellees' representations, A.270, and the express terms of the discovery order, A.282. There was no dissemination of information that identified any respondent. The names of persons residing in any enumerated household were to be redacted. A.282-83. There was no evidence that the respondent was otherwise identified on the address registers. Appellees did not seek and the district court did not grant access to individual reports. Also, under the protective aspects of the order, persons granted access to the documents were ordered not to disclose or use the FARs "for any other purpose whatsoever," and were sworn to confidentiality.

At the second and sixth steps, however, the statutory privilege may apply, as information furnished by respondents is sought. However, the statutory privilege is not absolute. The information furnished by respondents may be disclosed for statistical purposes as long as respon-

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[5] Indeed, it would be far-reaching to assert a privacy interest in an address that is voluntarily disclosed to the post office or a retail establishment and which is utilized to receive mail. Privacy protection does not extend to information that a person voluntarily and knowingly exposes to the public. *See, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455-59, 465 (1977); *United States v. Miller*, 425 U.S. 435, 442 (1976); *Katz v. United States*, 389 U.S. 347, 351 (1967).

dents are not identified and the individual reports are not disclosed. *See* text at app. 2-5, *supra*. So "[t]he potential harm from disclosure of any communication subject to a privilege must be weighed against the benefits of disclosure." *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 390 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *see United States v. IBM*, 1975-2 Trade Cases, ¶ 60,383 (S.D.N.Y. 1975). It is appropriate in determining the availability of a privilege to consider protective orders tailored to the case at hand. *Carr*, 431 F.2d at 390, *cert. denied*, 400 U.S. 1000. The district court heard argument and considered counsel's submissions before ordering disclosure. The disclosure order recited the competing considerations. The order was crafted to satisfy both the letter and intent of § 9(a). The information was sought only for statistical purposes and the disclosure order prohibited dissemination of information identifying census respondents. Access to the individual reports was never at issue. It was not an abuse of discretion to comply fully with the statutory privilege and order the FARs produced subject to a protective order.

In reviewing the disclosure order of the district court relative to the D-160s "other than those indicating that the household unit is occupied," we first determine what data is contained in D-160s. In addition to the address and vacant condition of the unit, D-160s specify the name of the person providing the information. A.320. This information is supplied by both census employees and respondents who are not residents of the vacant units. The protective order only permitted the Bureau to redact from the documents the names of residents of enumerated households. As disclosure of the D-160s would identify the individual respondents, who may not be census employees, such disclosure would violate § 9(a)(2)

as construed above. As the disclosure order with respect to the D-160s inadequately protected the confidentiality of census respondents the order was erroneous.

I conclude that 13 U.S.C. § 9 is not as broad as claimed by appellants, but that it does reach some matter ordered disclosed by the district court.

II.

Following the discovery order, the Census Bureau persisted in its claim of privilege. The district court certified its disclosure order to this court and stayed the production order. Following the October 1, 1980 order by this court denying review, appellees sought a preclusion order under Fed.R.Civ.P. 37(b)(2) for appellants' failure to comply with the disclosure order.

Our review is limited, of course, to determining whether the preclusion order was an abuse of discretion. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (per curiam). There are several novel considerations in issuing sanctions against government officials for failure to permit discovery: (1) the significance of an abuse of discretion is magnified by the importance of the issue and the status of the noncomplying party; and, (2) issue-related sanctions are ordinarily sufficient. *See In re Attorney General of the United States*, 596 F.2d 58, 65 (2d Cir. 1979). As the opinion of the court emphasizes, the unique nature of this case bears out the importance of limited and necessary sanctions. Nonetheless, the district court found that a preclusion order was appropriate in light of appellants' "knowing and wilful" noncompliance with the discovery order. There is no contention, however, that appellants' reticence was a matter of bad faith, and the district court did not so find.

I agree with the rest of the panel that the preclusion order was overly broad. First, there was ample evidence already made available by appellants that contained essentially the same information as contained in the FARs. The Bureau was producing Form 388s, which contained the total population and housing unit figures from the address registers for each enumeration district. A.352. The 388s also provide totals of vacant housing units. *Id.* Second, the order effectively determined several issues despite contrary evidence not derived from the FARs or D-160s. For example, there was independent evidence that the undercount in rural areas was greater than the undercount in urban areas, A.635, that could not be offered at trial to rebut the plaintiff's case as a result of the preclusion order. This was a matter of historical fact unrelated to issues of the present undercount in New York and the claims of mismanagement, but tending to disprove appellees' claim. Third, the FARs and D-160s were not necessary to prove several of the claims that were included in the preclusion order. Paragraphs 47(a) and 47(b) of the complaint, for example, allege that inadequate staffing and procedures constituted mismanagement that exacerbated the undercount. The extent of the staffing and the adequacy of procedures are not proved or disproved by anything in the FARs or D-160s.

The court's opinion implies that the district court did not adequately consider the interests of other states as claimants to both the representational and budgetary pies. Clearly the case requires consideration of the interests of other states. But this appeal concerns primarily the issue whether the decision concerning discovery and the subsequent preclusion order as a sanction for failure to permit court ordered discovery was tailored to the facts of the case. I do not agree with the court's opinion that

"[t]he question presented by litigation such as the one now before us is whether one state can be granted such an increase [in congressional representation] without full consideration having been given to the effect on other states." Slip op., at 6. The interests of other states are not, strictly speaking, implicated until different types of relief are being considered, although a decision on the merits regarding both the claimed undercount and mismanagement is highly desirable. From a practical standpoint, I am not at all sure whether the court's opinion proposes to consider other states' interests in a manner that is any different from the adopted course of the district court. The entire panel apparently believes that it is possible to conduct the trial in this case, even though only one state is involved, so long as there is no prejudice to the rights of others. The district court order provided that any appropriate relief should be formulated by the Census Bureau in a manner that safeguards the absent interested parties. A.41-42. The Bureau, and not the district court, must initially bear the responsibility of formulating equitable relief if such relief is warranted.

III.

In sum, I find the express language of 13 U.S.C. § 9(a), as well as its legislative history and case interpretation, to support a narrower privilege than that advanced by the appellant and accepted by the majority. However, the district court's disclosure order did not meet the command of the statute. I also find that the preclusion order was not tailored to the conduct or information at issue. Accordingly, I concur in the judgment.

APPENDIX B

STATE OF MICHIGAN,)
) ss.:
COUNTY OF WAYNE ,)

PATRICIA COUSENS BECKER, being duly sworn, deposes and says:

1. I am the head of the Data Coordination Division, Planning Department of the City of Detroit. I have been an employee of the City of Detroit since January 1968. Throughout my tenure with the City my primary responsibility, along with my staff, has been to compile, analyze and disseminate demographic, socio-economic and physical data regarding the City of Detroit. In the course of my professional duties, I have become familiar with the operations of the Census Bureau and with the data it produces. I am the author of several articles on topics related to the census, I am the Chairperson of the Detroit Regional Census Advisory Committee, and I was a member of the Panel on Decennial Census Plans which prepared the 1978 report of the National Acadmey of Sciences entitled Counting the People in 1980: An Appraisal of Census Plans.

2. As part of my responsibilities, I monitored Census Bureau operations in Detroit during the 1970 Census. During the latter part of July 1970, I and several other local officials expressed concern to the Census Bureau

that there had been significant omissions in census coverage in Detroit.

3. In response to these expressions of local concern, the Census Bureau made its address registers for certain areas of the City available to employees of the City of Detroit in order to permit a check for omitted housing units. Three Detroit employees, Julie Sabit from the City Plan Commission, Gary Sands from the Mayor's Committee for Community Renewal, and I were sworn to confidentiality pursuant to 13 U.S.C. § 23(c). Thereafter, on August 1, 1970, Julie Sabit and I went to a Census Bureau District Office in Detroit and compared the Bureau's address registers against lists of housing units prepared by the City. Subsequently, a letter was sent to the Census Bureau by Homer Hall, then Acting Director of the Mayor's Committee for Community Renewal, reporting the omissions discovered through our review of the address registers. A copy of Mr. Hall's letter, dated August 4, 1970, is attached hereto as Exhibit A. A copy of a responsive letter from Robert G. McWilliam, Acting Regional Director, Bureau of the Census, dated August 13, 1970, is attached hereto as Exhibit B.

Patricia C. Becker
Patricia Cousens Becker

Sworn to before me this
4th day of December, 1980.

Linda Mary Cirlek
Notary Public
Wayne County 10-9-83
Michigan

Exhibit A To Becker Affidavit

City of Detroit
ROMAN S. GRIBBS, Mayor

HOMER HALL
Acting Director
MILTON ROGUCKI
Assistant Director

MAYOR'S COMMITTEE FOR COMMUNITY RENEWAL
1302 City-County Building
Detroit, Michigan 48226
963-1012

August 4, 1970

Mr. Hobart Yerkey
Regional Director
Bureau of the Census
2100 Washington Blvd. Building
234 State Street
Detroit, Michigan 48226

Dear Mr. Yerkey:

Miss Patricia Cousens and Miss Julie Sabit spent several hours on Saturday, August 1, 1970, working with the address registers in the Detroit East Field Office. Several groups of missed housing units were identified, as follows:

1. In Brewster-Douglass housing project:

637 Watson	649 Watson	661 Watson
639 "	651 "	663 "
641 "	653 "	665 "
643 "	655 "	667 "
645 "	657 "	669 "
647 "	659 "	671 "

633 Watson, Apartments 446-454
635 " " 455-463
609 " " 485-496

Total: 48 Units
Tract: 529
Block: 106

Note: Several other segments of this public housing project were miscoded into the wrong enumeration districts (ED 4211, 4212, 4240 and 4241). Notes were left in the address registers; we have a

duplicate copy of the errors.

2. Palms Apartments, 1001 E. Jefferson; Tract 505, Block 116. This building, with approximately 52 units, is missing altogether.

   Note: Listings on the Chrysler Freeway are miscoded in Tract 505, Block 113. They belong in Tract 505, Block 114. There are also miscodings for Navarre Place in Tract 509; this street is located entirely in Tract 505, Block 113.

3. 3737 Beaubien (Tract 533, Block 106). This place is a residence for interns and residents at Harper Hospital. It contains 47 apartments and 96 sleeping rooms for a total of 143 separate housing units. It was enumerated as a group quarters with 61 people; Mr. McGrath of the Detroit East Office agrees that this is an error. At full occupancy, the place probably houses around 200 people.

4. Park Shelton, 15 E. Kirby (Tract 545, Block 206). Apartments 610 and 1023 through 1031 were missed, totalling 9 units.

Would you please let me know by Monday, August 10th, what action you plan to take regarding these particular missed addresses.

In the course of our work with the address registers and other materials, we determined that a large number of addresses, while not absolutely missing, are erroneously geocoded. We understand that these errors, as they were identified by the field offices, were noted and forwarded to Washington for correction by the Geography Division. We would like to know what procedure will be followed to insure that the corrections will be made to the address register, so that the published data (in print or on summary tapes) will be correct for small areas.

Because of the point in time at which we gained access to the address registers, we were able to work only in one field office, covering 20 to 25 percent of the City. Had we been able to make similar checks in the other areas, we feel certai

like errors would have been found. In particular, we suspect errors in the Jeffries and Parkside public housing project.

We appreciate the opportunity to have had City staff members deputized so that they were able to examine the Census records, and feel much more confident in our understanding of the field procedures used in the 1970 Census. We look forward to recovering the results of further field work in the outlined problem areas. Finally, let us hope that in the future we can work together more closely from the beginning of a project in an effort to obtain the best possible data.

Sincerely,

Homer Hall
Acting Director

HH:hm

cc: Mr. Ted McGrath, Director
Detroit East Field Office

Mr. William T. Fay, Chief
Geography Division

Exhibit B to Becker Affidavit

DEPARTMENT OF COMMERCE

August 11, 1970

Mr. Bruce Hall
Acting Director
Mayor's Committee for Community Renewal
302 City - County Building
Detroit, Michigan 48226

Dear Mr. Hall:

This is in response to your letter of August 4, 1970 regarding the findings of Miss Patricia Cousens and Miss Julie Sabit when they worked recently with the Census materials.

The addresses they were unable to locate will be checked out and any that are found to be missing will be added to our lists and enumerated. You will be advised of the results of this check.

Published Census data both in print and on summary tapes will be based on a tabulation of Census questionnaires. Each questionnaire is coded to tract and block. The computers will be programmed to correct those questionnaires erroneously geocoded. Since the address registers will not be used in the tabulations, it will not be necessary to move addresses from one address register to another to insure accurate Census data.

I am glad to learn of your increased confidence in Census procedures resulting from Miss Cousens and Miss Sabit's visit. If the Bureau can be of further assistance, please let me know.

Sincerely,

ROBERT G. MARKLEY
Acting Regional Director

Best Copy Available